

In the matter of )  
 )  
 ) **MUR 6888**  
Americans for Prosperity )  
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## RESPONSE OF AMERICANS FOR PROSPERITY TO THE COMPLAINT AND SUPPLEMENTAL COMPLAINT

<sup>1</sup> The original complaint contains two allegations that do not even reference AFP: namely, that the Republican National Committee (“RNC”) received excessive contributions in the form of in-kind services from the Data Trust, and that the RNC appears to have illegally established, financed, maintained and/or controlled the Data Trust. The Complaint contains no factual assertions or legal arguments that AFP was involved in these allegations. *See* Compl. at 15-19. Accordingly, AFP will not be separately addressing the allegations in this response because there are no factual allegations or legal arguments to respond to, and we respectfully request that the Commission dismiss these allegations against AFP and take no further action. *See* MUR 4850 (Deloitte & Touche, LLP), Statement of Reasons of Chairman Darryl R. Wold and Commissioners David M. Mason and Scott E. Thomas at 2 (rejecting the Office of General Counsel’s recommendation to find reason to believe because the respondent did not specifically deny conclusory allegations, and holding that “[a] mere conclusory allegation without any supporting evidence does not shift the burden of proof to the respondents.”)

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Under the Act and Commission regulations, a complaint must satisfy specific requirements in order to be deemed legally sufficient. Specifically, a complaint must contain a "clear and concise recitation of the facts which describe a violation of statute or regulation over which the Commission has jurisdiction." 11 C.F.R. § 111.4(d)(3). Absent such a "clear and concise recitation of the facts," a complaint is legally deficient and must be dismissed. *See* MUR 6554 (Friends of Weiner), Factual and Legal Analysis at 5 ("The Complaint and other available information in the record do not provide information sufficient to establish [a violation]."). Consistent with this requirement, the Commission has already made clear that simple speculation by a complainant is insufficient and does not establish that there is reason to believe a violation occurred. MUR 5467 (Michael Moore), First General Counsel's Report at 5 ("Purely speculative charges, especially when accompanied by a direct refutation, do not form the adequate basis to find reason to believe that a violation of [the Act] has occurred." (quoting MUR 4960 Statement of Reasons at 3)). Due process and fundamental fairness dictate that the burden must not shift to a respondent merely because a complaint is filed with the Commission. *See* MUR 4850 (Deloitte & Touche, LLP), Statement of Reasons of Chairman Darryl R. Wold and Commissioners David M. Mason and Scott E. Thomas at 2 (rejecting the Office of General Counsel's recommendation to find reason to believe because the respondent did not specifically deny conclusory allegations, and holding that "[a] mere conclusory allegation without any supporting evidence does not shift the burden of proof to the respondents."). This is especially the case where the complaint does not contain sufficient information to establish an alleged violation or provide the respondent with sufficient information to meaningfully respond to the allegations. *See* MUR 4960 (Hillary Rodham Clinton for US Senate Exploratory Committee, Inc.), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas at 2 ("Unwarranted legal conclusions from asserted facts . . . will not be accepted as true."). The

Complaint in the instant matter fails these rudimentary regulatory requirements and is a dishonest attempt to shift the burden to the Respondents through the use of innuendo and conjecture. It makes spurious claims that are not supported by the factual allegations contained in the Complaint and its legal theories do not satisfy the Commission's regulatory requirements to support a reason to believe finding. *Machinists Non-partisan Political Action Comm. v. FEC*, 655 F.2d 380, 388 (D.C. Cir. 1981) ("[M]ere 'official curiosity' will not suffice as the basis for FEC investigations").

**2. THE COORDINATION ALLEGATIONS IN THE COMPLAINT ARE MISPLACED BECAUSE THEY FAIL TO SATISFY BOTH THE CONTENT AND CONDUCT STANDARDS.**

The pertinent allegation in the Complaint against AFP is that the data services provided to AFP by i360 somehow constitute in-kind contributions in the form of coordinated public communications to i360's campaign and party committee clients and to the Republican National Committee as a result of a purported data sharing agreement between i360 LLC and GOP Data Trust LLC. The Complaint does not allege that AFP is a party to the data sharing agreement between i360 and GOP Data Trust LLC.

Commission regulations establish a three-prong test to determine whether a public communication can be considered coordinated with a campaign or party committee and, therefore, constitute an in-kind contribution to the campaign or party committee. The first test is whether the public communication is paid for by a person other than the candidate's campaign or the candidate referenced in the public communication. The second test is whether the communication at issue satisfies one of the enumerated content standards. The third and final test is whether a conduct standard is met regarding the interactions between the entity paying for the public communication and the candidate or political party committee. All three tests must be satisfied and if the allegation fails to satisfy one test, the complaint fails to satisfy the regulatory

requirements for a coordinated communication and must be dismissed. *See* 68 Fed. Reg. 421, 426 (Jan. 3, 2003).

Under this regulatory framework, the Complaint in the instant matter is legally deficient for several reasons. First, the Complaint does not identify any public communications that it contends were made by AFP—much less any that satisfy the content standards under 11 C.F.R. § 109.21. For this reason alone, the Complaint is legally deficient as applied to AFP and does not satisfy the threshold burden for the Commission to find reason to believe that a violation occurred, and must be dismissed. 68 Fed. Reg. at 430 (Jan. 3, 2003) (“In this light, the content standard may be viewed as a ‘filter’ or a ‘threshold’ that screens out certain communications from even being subjected to analysis under the conduct standards.”); MUR 4850 (Deloitte & Touche, LLP), Statement of Reasons of Chairman Darryl R. Wold and Commissioners David M. Mason and Scott E. Thomas at 2 (“[a] mere conclusory allegation without any supporting evidence does not shift the burden of proof to the respondents.”).

Second, even if the Complaint had identified specific public communications by AFP that satisfy the content standards under the Commission’s coordinated communications rule—which it did not—the Complaint is still legally deficient because it misstates the “common vendor” rule and fails to set forth any facts that would constitute a violation of the conduct standard. Under 11 C.F.R. § 109.21(d)(4), utilizing a common vendor satisfies the conduct standard if three conditions are met: (1) the person paying for the communication contracts with or employs a common vendor to create, produce or distribute the public communication; (2) the commercial vendor provided specified services to the candidate referenced in the public communication that puts the vendor in a position to acquire information about the campaign’s plans, projects, activities or needs material to the creation, production or distribution of the public communication; and (3) the commercial vendor must use or convey to the person paying for the

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public communication private information about the candidate or campaign's plans, projects, activities or needs that is material to the creation, production or distribution of the public communication at issue. *See also* 75 Fed. Reg. 55947, 55957 (Sept. 15, 2010). Material information that was obtained from a public source does not meet this conduct standard. 11 C.F.R. § 109.21(d)(4)(iii); 75 Fed. Reg. at 55957. Finally, the common vendor rule "does not presume coordination from the mere presence of a common vendor." 68 Fed. Reg. at 437 ("The Commission does not anticipate that a person who hires a vendor and who, irrespective of BCRA's requirements, follows prudent business practices, will be inconvenienced by the final rule.").

As stated above, the Complaint does not identify a single AFP communication that it contends was coordinated. Therefore, it is impossible to even discern, based on a four-corners reading of the Complaint, with whom AFP is alleged to have coordinated. The Complaint does not identify which candidate or candidates were referenced in an AFP communication, let alone whether AFP used a vendor (1) for the creation, production or distribution of a public communication that also provided services to a campaign identified in that public communication, (2) that was in a position to acquire information about a campaign's plans, projects, activities or needs, and (3) and that used or conveyed such information with AFP when it paid for an unidentified public communication that may or may not satisfy one of the content standards. The burden is not on AFP to fill the holes in Complainant's deceitful Complaint, which fails the tests under the common vendor conduct standard and must be dismissed.

Third, voter lists and data services do not constitute the private plans, projects, activities or needs of a campaign that could be material to the creation, production or distribution of a public communication that satisfies the content and payment standards. The current Commission coordination rules focus on the flow of material, non-public information from a campaign or

party committee to an outside spender sponsoring public communications that satisfy the content standards. Contrary to the descriptions and contentions of the Complaint, voter lists and data, by definition do not contain the private plans, projects, activities or needs ("PPAN") of a campaign. Rather, PPANs relate to electoral and communications strategies and tactics employed by a campaign—information that is generated internally by the candidate in consultation with key employees and consultants about how to achieve electoral victory. PPAN does not relate to commoditized voter information and data about the demographic or even ideological makeup of the voters in a candidate's jurisdiction—information that is developed outside the scope of a campaign's internal decision-making processes. Since voter lists and data are not PPAN, they cannot be material to the creation, production or distribution of a coordinated communication under the common vendor rule.

Moreover, the foundation of such voter lists and behavioral data are the publicly available lists maintained by Secretaries of State and county registrars.

The foundation of voter databases is the publicly available official voter files maintained by Secretaries of State, which ensure that only eligible citizens actually cast ballots and that no citizen votes more than once. . . . More directly relevant to campaigns, certain details about past electoral participation are also recorded on official voter files. Who citizens vote for is secret, but whether citizens vote is reflected in official voter files—as is the method used for voting: for example, in person on Election Day, or by use of absentee or another form of early voting. This information concerning past vote history tends to be the most important data in the development of turnout behavior scores, which is unsurprising given that the act of voting reveals the person to be a person with a high propensity to vote.

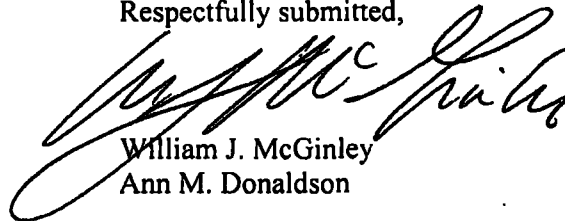
David W. Dickerson & Todd Rogers, *Political Campaigns and Big Data*, Harvard Kennedy School of Government at 8-9 (Feb. 2014). Even if such voter lists are enhanced with consumer and behavioral data, this is not sufficient to convert such information about the voters in a candidate's jurisdiction into internally-created strategies and tactics that are material to the creation, publication and distribution of a public communication. MUR 6038 (Lamborn),

Statement of Reasons of Chairman Matthew S. Peterson, Vice-Chair Cynthia L. Bauerly, and Commissioners Caroline C. Hunter, Donald F. McGahn, Steven T. Walther and Ellen Weintraub at 4 (dismissing coordination complaint regarding the conveyance of an enhanced voter list from a campaign to outside group via a common vendor). Accordingly, voter lists and data cannot form the basis for a coordination finding under the third test of the common vendor regulation and, further, their core components also satisfy the publicly available information safe harbor under the same regulation. *See id.*

### 3. CONCLUSION

For all of the reasons stated above, there is no factual or legal basis for finding reason to believe a violation was committed by AFP. Accordingly, we respectfully request that the Commission dismiss the Complaint against AFP, close the file, and take no further action.

Respectfully submitted,



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